IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHAVOTNAE GOLDSBY,

Plaintiff,

v.

ADECCO, INC.,

Defendant

_____/

No. C-07-5604 MMC

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION; DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO MODIFY PRETRIAL PREPARATION ORDER

Before the Court are two motions filed by plaintiff Shavotnae Goldsby ("Goldsby"): (1) "Motion for Class Certification," filed September 30, 2008; and (2) "Motion to Modify Pretrial Preparation Order" ("Motion to Modify"), filed October 31, 2008. Defendant Adecco, Inc. ("Adecco") has filed opposition to Goldsby's Motion for Class Certification, to which Goldsby has replied; further, each party, with leave of court, has filed supplemental briefs in connection with said motion. Adecco has not filed opposition or otherwise responded to the Motion to Modify. Having read and considered the parties' respective submissions, the Court rules as follows.[1]

//

//

[1]By order filed January 21, 2009, the Court took the motions under submission.

A. Motion for Class Certification

In the First Amended Complaint ("FAC"), Goldsby alleges, on her own behalf and on behalf of a class, that Adecco "failed to pay its California hourly employees compensation for work without meal break periods." (See FAC ¶ 6.) By the instant motion, Goldsby seeks to certify a class defined as follows:

> Persons employed by Adecco as Associate employees placed at client worksites without the presence of Adecco supervisory personnel paid on an hourly basis for whom Adecco records depict a meal period not taken who did not receive a compensation payment by Adecco for the lack of said meal period.

(See Pl.'s Memorandum filed November 24, 2008 ("Reply") at 4:19-21.)[2] "Associate employees" of Adecco are persons whom Adecco gives "temporary work assignments" and who work at the site of an Adecco client. (See Kim Decl. Ex. 1 at AD 0002.) Although Adecco directs its Associates to "follow and comply with the rules, policies, procedures, and working conditions established by Adecco clients for their premises," Associates are employees of Adecco, and Adecco pays its Associates an "hourly wage for each assignment." (See id. Ex. 1 at AD 0006-0008.) Thus, no class member worked directly for Adecco and no class member was supervised by Adecco while he or she performed work subject to the procedures of the Adecco client.

In support of the instant motion, Goldsby asserts that during the class period, "Adecco sent temporary employees to 305,441 individual client work site assignments in California." (See Pl.'s Mot. for Class Cert. at 4:5-6.) Further, according to Goldsby, "Adecco assign[ed] temporary workers to client job sites, and simply assume[d] clients provide[d] meal periods," Adecco "[took] no steps to determine if temporary employees receive[d] meal periods," and "[w]hen employees' time records [were] submitted to Adecco that fail[ed] to depict meal periods, Adecco [took] no further action to determine if meal

---

[2]Additionally, the proposed class is limited to "persons employed by Adecco between July 26, 2003, and the present" (see Pl.'s Mot. for Class Cert. at 2:18-17), and excludes therefrom "persons within the Cervantez class definition," (see id. at 2:20-28), a reference to a class of Adecco employees who worked for Adecco's client Celestica, Inc., and as to whom a separate action is pending.

periods were provided, or to determine if extra compensation [was] owed." (See id. at 16:1-7.)

On behalf of herself and said putative class, Goldsby seeks to recover "unpaid meal period compensation," pursuant to § 226.7 of the California Labor Code, as well as "penalties" under the Private Attorney General Act of 2004. (See id. at 2:13-15.)

1. California Law Regarding the Providing of Meal Breaks

California Labor Code § 512 provides in pertinent part:

> (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

See Cal. Labor Code § 512(a).

California Labor Code section 226.7(a) includes a similar requirement:

> (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

See Cal. Labor Code § 226.7.

The Industrial Welfare Commission has issued the following Industrial Welfare Commission Wage Orders pertinent to the providing of meal periods:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

See 8 C.C.R. § 11090(11).

2. Application of Rule 23

A district court may not certify a class unless the plaintiff has "established the four prerequisites of [Rule] 23(a) and at least one of the alternative requirements of [Rule] 23(b)." See Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). The prerequisites of Rule 23(a) are as follows: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." See Fed. R. Civ. P. 23(a). Rule 23(b)(3), the one alternative requirement Goldsby additionally seeks to establish, provides for certification of a class where "the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." See Fed. R. Civ. P. 23(b)(3).

Although a district court, in considering a motion for certification, "is bound to take the substantive allegations of the complaint as true," see Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975), "the class determination generally involves considerations that are

enmeshed in the factual and legal issues comprising the plaintiff's cause of action," see General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982) (internal citation and quotation omitted). Thus, "the court also is required to consider the nature and range of proof necessary to establish [the] allegations" of the complaint." See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982) (affirming denial of class certification, where "any theory on which [plaintiffs] might rely [to prove the substantive allegations of the complaint] would raise predominantly individual questions").

Here, assuming, arguendo, Goldsby could establish each of the four prerequisites of Rule 23(a), the Court finds, for the reasons discussed below, Goldsby has failed to establish that "questions of law or fact common to members of the class predominate over any questions affecting only individual members," and, consequently, Goldsby has failed to show certification is proper under Rule 23(b)(3).

For purposes of determining whether common issues predominate over individual issues, the Court's analysis centers on whether Goldsby's substantive allegation, that Associates were not provided with meal breaks, can be established on a class-wide basis. See Valentino, 97 F.3d at 1234 (holding district court abused its discretion by certifying class, where "[t]here [was] no showing by [p]laintiffs of how the class trial could be conducted"); see also Poulos v. Caesars World, Inc., 379 F.3d 654, 667-68 (9th Cir. 2004) (affirming denial of motion for class certification of RICO claims, where plaintiffs failed to show they could establish essential element of causation on "classwide" basis).

As noted, the putative class members are temporary employees and, by class definition, worked at sites where Adecco did not supervise them; according to Goldsby, Adecco sent its employees to more than 300,000 different sites in California during the class period. As further noted, Goldsby asserts herein that Adecco "assume[d]" its clients provided Associates with meal periods, but did nothing to determine whether such assumption was warranted. If, however, irrespective of any failure to act on the part of Adecco, the client in fact provided the Associate with a meal break, that Associate was not

deprived of his or her right to be provided a meal break. See Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th 1094, 1108 (2007) (holding "employee is entitled to [remedy under § 226.7(b)] "upon being forced to miss a rest or meal period"). Consequently, a significant issue relevant to liability, indeed, a dispositive issue, is whether the putative class members were, in fact, provided with meal breaks at numerous different client sites during the class period.

As noted, the class, as proposed by Goldsby, consists of Associates as to whom "Adecco records depict a meal period not taken." (See Pl.'s Reply at 4:19-21.) Goldsby has clarified in a supplemental brief, however, that the proposed class "consists of [Associates]" for whom Adecco records "do not depict" whether the Associate was provided a meal period by the client. (See Pl.'s Supp. Brief, filed December 22, 2008, at 2:13-16.) As Goldsby has further clarified, where, for example, an Associate reports his/her hours using an "electronic time recording system" or a "telephone-based time record system," such system will not indicate whether a meal period was provided. (See id. at 2:2-7.)[3] In other words, the Adecco records for such putative class members are alleged to be silent as to whether Associates were provided a meal break by the client. As a result, such records have little, if any, evidentiary value for purposes of determining whether a particular Associate was provided a meal period. Indeed, Goldsby concedes she "[does] not propose to use Adecco's records to establish violation rates." (See Pl.'s Reply at 3:7-8.) Rather, according to Goldsby, she proposes to "prove damages by statistical evidence, sampling and pattern and practice evidence." (See id. at 3:5-6.) Goldsby fails to identify, however, the nature of any such statistical evidence or any particular sampling method that could be employed to prove damages on a class-wide basis. "It is not sufficient . . . simply to

[3]Goldsby does not state how many class members she believes used electronic or phone systems, or some other system that did not require the Associate to state whether or not the Associate had been provided a meal break by the client. In explaining why she believes the putative class is numerous, however, plaintiff asserts that, as an example of why she believes many Associates fall into her proposed class definition, "approximately 80 percent" of Associates who work as "clerical employees" in the "greater Los Angeles area" report hours using "on-line record systems which do not depict meal periods." (See id. at 3:8-12.)

mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question." Dunbar v. Albertson's, Inc., 141 Cal. App. 4th 1422, 1432 (2006). As in Dunbar, "plaintiff has failed to do so here." See id. Further, Goldsby fails to identify, even in a cursory manner, how she would propose to establish liability on a class-wide basis, nor is any such means apparent. In particular, Goldsby fails to explain why a determination of the meal period procedures employed at each of the thousands of client sites implicated herein would not predominate over the determination of issues common to the class.

Further, to the extent Goldsby relies on Cervantez v. Celestica Corp., 253 F.R.D. 562 (C.D. Cal. 2008), such citation is unavailing, as the circumstances underlying the certification in that case are distinguishable. Although Cervantez, like the instant case, was brought by an Adecco associate who alleged Adecco failed to pay Associates for missed meal periods, the district court therein certified a class of Associates who worked for one specific Adecco client and who were allegedly subject to the same practices by that client. See id. at 569, 576 (certifying class of Adecco employees who worked for single client; stating "employees [Adecco] furnished [to client] were subject to the same policies with respect to meal and rest periods," specifically, a "failure to provide a second meal period after ten hours of work"). Here, by contrast, Goldsby has made no allegation in the FAC, nor an assertion in the instant motion, that the thousands of Adecco clients in California employed the same or similar unlawful practices, such as a "failure to provide a second meal period after ten hours at work." See id. at 569. Consequently, and irrespective of the meaning of the word "provide" for purposes of California law,[4] the trier of fact would necessarily have to determine what occurred at each of the thousands of client sites in California in order to resolve the issue of whether any particular Associate who worked at a particular site was provided a meal period.

[4]Precisely what an employer must do to "provide" a meal break to an employee is an unresolved issue of state law. See Brinker Restaurant Corp. v. Superior Court, 165 Cal. App. 4th 25 (2008) (holding "meal breaks need only be made available, not ensured"), reviewed granted, 196 P.3d 216 (Cal. 2008).

In sum, Goldsby has failed to demonstrate that common issues of material fact relevant to liability predominate over individual issues and, as a consequence, Goldsby has not demonstrated certification of the putative class is appropriate. See, e.g., Brown v. Federal Express Corp., 249 F.R.D. 580, 587 (C.D. Cal. 2008) (holding, where plaintiff alleged employer failed to provide meal periods to proposed class of employees, common issues did not predominate over individual issues, where plaintiff "propose[d] no method of common proof that would establish [key factual questions]").

Accordingly, the Motion for Class Certification will be denied.

B. Motion to Modify

Goldsby seeks an extension of various deadlines and dates set forth in the Pretrial Preparation Order, including the May 4, 2009 trial date, in the event the Court grants her Motion for Class Certification. As discussed above, however, the Motion for Class Certification will be denied, and, accordingly, Goldsby's Motion to Modify will be denied as well. Nonetheless, in light of an ongoing criminal trial which, at the present time, is expected to continue for several months, a continuance of the trial date may be necessary. The Court will address such considerations at the February 20, 2009 Status Conference.

CONCLUSION

For the reasons stated above:

1. Goldsby's Motion for Class Certification is hereby DENIED; and

2. Goldsby's Motion to Modify is hereby DENIED, without prejudice to either party's seeking an adjustment of the current pretrial and trial dates as may be deemed appropriate at the February 20, 2009 Status Conference.

IT IS SO ORDERED.

Dated: February 4, 2009

MAXINE M. CHESNEY
United States District Judge